Md Shahidul Islam v Ketua Pengarah Jabatan Imigresen Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW WA-25–381–05 OF 2022
AHMAD KAMAL J
29 AUGUST 2023

Administrative Law — Judicial review — Application for — Cancellation of social visit pass by Director General of Immigration — Cancellation of principal pass and dependant pass pursuant to s 9(1)(b) of Immigration Act 1959/63 — Whether decision to cancel applicant's dependant pass was made without reasonable excuse — Whether cancellation of applicant's dependant pass was not made in accordance with law — Whether applicant was deprived of right to appeal to minister pursuant to s 9(8) of Immigration Act 1959/63 — Whether failure of minister to respond or decide appeal amounted to procedural non-compliance actionable by way of judicial review — Whether decision tainted with errors of law, irrationality and/or unreasonableness — Rules of Court 2012 O 53

Immigration — Admission into and departure from Malaysia — Director General's power to prohibit entry, or cancel any pass or permit — Cancellation of Social Visit Pass by Director General of Immigration — Cancellation of principal pass and dependant pass pursuant to s 9(1)(b) of Immigration Act 1959/63 — Whether decision to cancel applicant's dependant pass was made without reasonableWhether applicant was deprived of right to appeal to minister pursuant to s 9(8) of Immigration Act 1959/63 excuse — Whether cancellation of applicant's dependant pass was not made in accordance with law — Whether failure of minister to respond or decide appeal amounted to procedural non-compliance actionable by way of judicial review — Immigration Act 1959/63 ss 9(1)(b), (4)(a), (6)(b), (8) & 59A

The applicant's wife was the principal pass holder of social visit pass under the Malaysia My Second Home ('MM2H') program whilst the applicant was the holder of the dependant pass. Upon discovering the involvement of the applicant's wife in a syndicate providing illegal temporary working pass to foreigners to come to Malaysia ('the illegal activities'), the Director General of Immigration ('the first respondent') had cancelled the applicant's wife's principal pass pursuant to s 9(1)(b) of the Immigration Act 1959/63 ('Act 155'). The applicant's wife was then deported to her country of origin, ie, Bangladesh. The Special Branch of the Royal Police of Malaysia ('PDRM') then recommended to the first respondent to cancel the applicant's dependant

A pass and to deport him back to Bangladesh on the ground that applicant was involved in the same illegal activities committed by his wife. The first respondent subsequently cancelled the applicant's dependant pass under s 9(1)(b) of Act 155 via a notice of cancellation of pass dated 16 December 2021 ('the first respondent's notice of cancellation of pass'). Disgruntled with
B the decision, the applicant filed the present application for judicial review ('encl 14') under O 53 of the Rules of Court 2012 to quash the first respondent's notice of cancellation of pass. The applicant submitted, inter alia, that: (a) the action and decision of the first respondent in cancelling the applicant's pass was done without reasonable excuse and was done not in
C accordance with the law; and (b) the notice of cancellation of pass was not duly served on time which resulted in the applicant being deprived of the opportunity to exercise his right to appeal to the minister under s 9(8) of Act 155.

D **Held**, dismissing encl 14 with costs of RM2,500 without the allocator fee:

(1) Judicial review was generally concerned with the decision-making process where the impugned decision was flawed on the ground of procedural impropriety. However, the law had now developed to allow a
E decision to be challenged on grounds of illegality and irrationality, which then permitted the courts to scrutinize the decision not only for the process, but also for substance. However, the Federal Court in subsequent decisions held that not every case was amenable to such an approach and merits could only be scrutinized in the most appropriate of
F cases. To succeed in an application for judicial review, the applicant must show that the respondents had, among others: (a) asked itself the wrong questions; (b) considered irrelevant matters; (c) failed to consider relevant matters; (d) failed to apply the proper principles of law; and/or (e) reached a decision that was so perverse that no reasonable tribunal
G under similar circumstances would have reached it (see paras 20–22 & 26).

(2) When the principal pass of the applicant's wife was cancelled under s 9(1)(b) of Act 155, s 9(6)(b) of the same Act was automatically triggered wherein the applicant's dependant pass was invalidated under s 9(4) of
H Act 155 and consequently, the applicant as the dependant pass holder was required to leave Malaysia and was prohibited from re-entering thereafter as stipulated in s 9(4)(a) of Act 155. Further, by virtue of s 9(6)(b) of Act 155, once the applicant's wife principal pass was cancelled under s 9(1)(b) of Act 155 and the applicant's wife was notified of the
I cancellation of her principal pass on 8 January 2021, such notification to the applicant's wife shall be considered as notification to the applicant regarding to the automatic cancellation of his dependant pass. Considering that s 9(6)(b) of Act 155 read together with s 9(4)(a) of the same Act dictate the mandatory cancellation of the applicant's dependant

pass by operation of law, and without the need of any intervention or action on the part of the first respondent, it followed that there could be no question of the cancellation of the applicant's dependant pass not being done in accordance with law (see paras 35–37 & 66).

(3) Upon perusal of the cause papers, the court found that the applicant was not deprived of the right to appeal to the minister under s 9(8) of Act 155. This was despite the fact of his inability to comply with the statutory time limit of sven days for filing of appeal (as he was under remand at the material times). In any event, his lawyer had lodged an appeal on his behalf to the minister vide letter dated 15 April 2022. This was again despite the fact that the said appeal to the minister was not received by the first respondent as required and informed to the applicant vide the notice of cancellation of pass. Further, pursuant to the proviso of s 9(8) of Act 155, lodging an appeal to the minister under s 9(8) of Act 155 did not operate as a stay against the cancellation of the applicant's dependant pass by the first respondent and did not have the effect to stop the immediate deportation or removal of the applicant from Malaysia (see paras 67–69 & 71).

(4) Section 9(8) of Act 155 did not impose any procedural obligation on the part of the respondents. The failure on the part of the minister to decide or respond to the appeal, if any, did not without more amount to a procedural non-compliance actionable by way of a judicial review. Even if it did, the court opined that s 59A of Act 155 prohibited a merits review. The question of whether the applicant's appeal should be allowed or otherwise was not a matter amenable to judicial review. Hence, the reliance by the applicant on his pending appeal to the minister under s 9(8) of Act 155 would not in any event assist his present judicial review application. In totality, the decision of the respondents was not tainted with any errors of law, irrationality and/or unreasonableness that warranted the intervention of this court (see paras 72–74).

[Bahasa Malaysia summary

Isteri pemohon ialah pemegang pas utama pas lawatan sosial di bawah program Malaysia Rumah Keduaku ('MM2H') manakala pemohon ialah pemegang pas tanggungan. Apabila mengetahui tentang penglibatan isteri pemohon dalam sindiket menyediakan pas kerja sementara haram kepada warga asing untuk datang ke Malaysia ('aktiviti haram'), Ketua Pengarah Imigresen ('responden pertama') telah membatalkan pas utama isteri pemohon menurut s 9(1)(b) Akta Imigresen 1959/63 ('Akta 155'). Isteri pemohon kemudian dihantar pulang ke negara asalnya, iaitu Bangladesh. Cawangan Khas Polis Diraja Malaysia (PDRM) kemudiannya mengesyorkan kepada responden pertama untuk membatalkan pas tanggungan pemohon dan menghantarnya pulang ke Bangladesh atas alasan pemohon terlibat dalam aktiviti haram yang sama dengan apa yang dilakukan oleh isterinya. Responden pertama kemudiannya

membatalkan pas tanggungan pemohon di bawah s 9(1)(b) Akta 155 melalui notis pembatalan pas bertarikh 16 Disember 2021 ('notis pembatalan pas responden pertama'). Tidak berpuas hati dengan keputusan tersebut, pemohon memfailkan permohonan semasa untuk semakan kehakiman ('lampiran 14') di bawah A 53 Kaedah-Kaedah Mahkamah 2012 untuk membatalkan notis pembatalan pas responden pertama. Pemohon berhujah, antara lain, bahawa: (a) tindakan dan keputusan responden pertama membatalkan pas pemohon telah dilakukan tanpa alasan yang munasabah dan dilakukan tidak mengikut undang-undang; dan (b) notis pembatalan pas tersebut tidak disampaikan tepat pada masanya yang mengakibatkan pemohon dilucutkan peluang untuk menggunakan haknya untuk merayu kepada menteri di bawah s 9(8) Akta 155.

Diputuskan, menolak lampiran 14 dengan kos sebanyak RM2,500 tanpa fi alokator:

(1) Semakan kehakiman secara amnya adalah berkenaan dengan proses membuat keputusan di mana keputusan yang dipertikaikan telah cacat atas alasan ketidakwajaran prosedur. Bagaimanapun, undang-undang kini telah dibangunkan untuk membenarkan keputusan dicabar atas alasan kepenyalahan undang-undang dan keadaan tidak rasional, yang kemudian membenarkan mahkamah meneliti keputusan tersebut bukan sahaja pada prosesnya, tetapi juga untuk substans. Walau bagaimanapun, Mahkamah Persekutuan dalam keputusan-keputusan berikutnya berpendapat bahawa bukan setiap kes boleh menerima pendekatan sedemikian dan merit hanya boleh diteliti dalam kes yang paling sesuai. Untuk menjayakan permohonan untuk semakan kehakiman, pemohon mesti menunjukkan bahawa responden-responden telah, antara lain: (a) bertanya kepada dirinya soalan yang salah; (b) mengambil kira perkara yang tidak berkaitan; (c) gagal mempertimbangkan perkara yang berkaitan; (d) gagal menggunakan prinsip undang-undang yang sepatutnya; dan/atau (e) mencapai keputusan yang sangat berlawanan sehinggakan tiada tribunal munasabah dalam keadaan yang sama akan mencapainya (lihat perenggan 20–22 & 26).

(2) Apabila pas utama isteri pemohon dibatalkan di bawah s 9(1)(b) Akta 155, s 9(6)(b) Akta yang sama telah dicetuskan secara automatik di mana pas tanggungan pemohon telah tidak sah di bawah s 9(4) Akta 155 dan seterusnya, pemohon sebagai pemegang pas tanggungan dikehendaki meninggalkan Malaysia dan dilarang daripada memasuki semula selepas itu seperti yang ditetapkan dalam s 9(4)(a) Akta 155. Selanjutnya, menurut s 9(6)(b) Akta 155, sebaik sahaja pas utama isteri pemohon dibatalkan di bawah s 9(1)(b) Akta 155 dan isteri pemohon dimaklumkan mengenai pembatalan pas utamanya pada 8 Januari 2021, pemakluman kepada isteri pemohon tersebut hendaklah dianggap sebagai pemakluman kepada pemohon berkenaan pembatalan

automatik pas tanggungannya. Memandangkan s 9(6)(b) Akta 155 dibaca bersama s 9(4)(a) Akta yang sama menetapkan pembatalan mandatori pas tanggungan pemohon mengikut kuat kuasa undang-undang, dan tanpa memerlukan apa-apa campur tangan atau tindakan di pihak responden pertama, maka tidak mungkin timbul persoalan bahawa pembatalan pas tanggungan pemohon tidak dilakukan mengikut undang-undang (lihat perenggan 35–37 & 66).

(3) Setelah meneliti kertas kausa, mahkamah mendapati bahawa pemohon tidak dilucutkan hak untuk merayu kepada menteri di bawah s 9(8) Akta 155. Walaupun hakikatnya dia tidak mematuhi keperluan had masa tujuh hari untuk memfailkan rayuan (kerana dia ditahan reman pada masa yang material). Walau apa pun, peguamnya telah membuat rayuan bagi pihaknya kepada menteri melalui surat bertarikh 15 April 2022. Walaupun hakikatnya rayuan kepada menteri tersebut tidak diterima oleh responden pertama seperti yang dikehendaki dan dimaklumkan kepada pemohon berdasarkan notis pembatalan pas tersebut. Selanjutnya, menurut proviso kepada s 9(8) Akta 155, pengemukaan rayuan kepada menteri di bawah s 9(8) Akta 155 tidak berfungsi sebagai penangguhan terhadap pembatalan pas tanggungan pemohon oleh responden pertama dan tidak mempunyai kesan untuk menghentikan pengusiran atau penyingkiran serta-merta pemohon dari Malaysia (lihat perenggan 67–69 & 71).

(4) Seksyen 9(8) Akta 155 tidak mengenakan apa-apa tanggungjawab prosedur ke atas pihak responden-responden. Kegagalan di pihak menteri untuk membuat keputusan atau menjawab rayuan, jika ada, tidak terjumlah kepada ketidakpatuhan prosedur yang boleh diambil tindakan melalui semakan kehakiman. Sekalipun begitu, mahkamah berpendapat bahawa s 59A Akta 155 melarang semakan merit. Persoalan sama ada rayuan pemohon patut dibenarkan atau sebaliknya bukanlah perkara yang boleh disemak secara kehakiman. Oleh itu, pergantungan pemohon terhadap rayuannya yang belum selesai kepada menteri di bawah s 9(8) Akta 155 tidak akan membantu permohonan semakan kehakimannya sekarang. Secara keseluruhannya, keputusan responden-responden tidak dicemari dengan apa-apa kesilapan undang-undang, keadaan tidak rasional dan/atau ketidakwajaran yang memerlukan campur tangan mahkamah ini (lihat perenggan 72–74).]

Cases referred to

Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh [2000] 3 MLJ 714; [2000] 1 MLRA 664; [2000] 4 CLJ 77, CA (refd)

Alam Venture Sdn Bhd & Anor v Abdul Aziz bin Abdul Majid & Ors [2015] 4 MLJ 270; [2015] 5 CLJ 1; [2015] 4 MLRA 371, FC (refd)

Haris Fathillah bin Mohamed Ibrahim & Ors v Tan Sri Dato' Sri Hj Azam bin

A *Baki & Ors* [2023] 2 MLJ 296; [2023] 3 MLRA 266; [2023] 3 CLJ 653, FC (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789; [1996] 2 MLRA 398; [1997] 2 CLJ 11; [1997] 1 AMR 1008, SC (refd)

B *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625; [2003] 2 MLRA 114, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 5 MLRA 696; [2010] 8 CLJ 629; [2011] 3 AMR 38, FC (refd)

C *Regina (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491; [2019] UKSC 22, SC (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 1 MLRA 268; [1995] 2 CLJ 748; [1995] 2 AMR 1601, CA (refd)

D **Legislation referred to**

Immigration Act 1959/63 s 9, 9(1)(b), (4), (4)(a), (6)(b), (8), 33, 33(1), 59A, 59A(1), (2), 59B(b)

Passports Act 1966 ss 12(1)(f), 55E

E Rules of Court 2012 O 53

Harpal Singh (with Low Carmen) (T Harpal & Assoc) for the applicant.

Liew Horng Bin (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

F **Ahmad Kamal J:**

INTRODUCTION

G **[1]** The applicant filed an application for judicial review (encl 14) under O 53 of the Rules of Court 2012 ('the ROC') to quash the first respondent's notice of cancellation of the applicant's Malaysia My Second Home ('MM2H') pass dated 16 December 2021.

H **[2]** In essence, the applicant was granted leave to apply for judicial review against the respondents to seek the following reliefs:

2.1 Satu perintah Certiorari membatalkan tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon pada 16.12.2021 yang bertentangan dengan peruntukan nyata dan tersirat Perlembagaan Persekutuan serta menyalahi Akta Imigresen 1959/63 (Akta 155) dan Peraturan-Peraturan Imigresen 1963;

I

2.2 Satu deklarasi bahawa tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon adalah 'mala fide' kerana Pemohon tidak melanggar (*contravene*) atau melakukan

sebarang kesalahan (*committed an offence*) di bawah Akta 155 pada setiap waktu material Pas beliau dibatalkan; A

2.3 Satu deklarasi bahawa tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon sebelum Pemohon dituduh di Mahkamah kerana pembatalan dibuat pramatang (*premature*) dan 'ultra vires' dengan Akta 155; B

2.4 Satu deklarasi bahawa tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon yang masih belum didapati bersalah untuk apa-apa kesalahan seperti dipertuduhkan di mana pembatalan yang dibuat 'premature' dan 'ultra vires' dan ianya adalah bertentangan dan bercanggah dengan Perlembagaan Persekutuan dan Akta 155; C

2.5 Satu deklarasi bahawa tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon tanpa sebarang alasan yang munasabah bertentangan dengan Akta 155; D

2.6 Satu deklarasi bahawa tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon adalah satu pelaksanaan kuasa secara tidak munasabah (*unreasonable exercise of power*);

2.7 Satu deklarasi bahawa tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon yang merupakan satu kesumbangan prosedur (*procedural impropriety*) kerana tidak mematuhi peruntukan di bawah Seksyen 9(8) Akta 155 yang membenarkan rayuan dibuat terhadap pembatalan tersebut; E

2.8 Satu perintah Mandamus terhadap Responden Ketiga dan Responden Kedua supaya mengarahkan dan menyelia Responden Pertama untuk tidak mencabuli hak kebebasan asasi Pemohon dan mematuhi peruntukan Perlembagaan Persekutuan; F

2.9 Satu perintah Mandamus terhadap Responden Ketiga supaya mengarahkan dan menyelia Responden Kedua dan Responden Pertama untuk menyelaraskan langkah pelaksanaan undang-undang Persekutuan secara rasional; G

2.10 Satu deklarasi bahawa Notis Pembatalan Pas terhadap Pemohon adalah 'ultra vires' Perlembagaan Persekutuan dan Akta 155;

2.11 Satu deklarasi bahawa Notis Pembatalan Pas oleh Responden Pertama adalah satu penyalahgunaan kuasa (*abuse of discretionary power*) kerana dibuat sebelum Pemohon dituduh di Mahkamah dan diserahkan kepada Pemohon tanpa penterjemah Bahasa Bangladesh semasa Pemohon berada di dalam Depot Tahanan Imigresen; H

2.12 Satu deklarasi bahawa Pemohon mempunyai jangkaan sah (*legitimate expectation*) bahawa langkah pelaksanaan undang-undang ke atas Pemohon hanya boleh dibuat menurut lunas undang-undang dan amalan sah yang terpakai; I

2.13 Bahawa segala arahan dan perintah yang perlu dan berikutan diberi;

2.14 Bahawa kos-kos dalam permohonan ditanggung Responden-Responden;

A

2.15 Pampasan ditaksirkan di atas aib, trauma, ketakutan, kehilangan, kerugian, kesusahan, kerosakan reputasi dan nama baik yang dialami dan ditanggung oleh Pemohon akibat tindakan pembatalan pas tersebut; dan

2.16 Relief-relief selanjutnya atau yang lain sebagaimana yang difikirkan sesuai dan berpatutan oleh Mahkamah yang Mulia ini.

B

[3] After the hearing, I dismissed the applicant's judicial review application (encl 14). I will now set out the grounds for my decision.

C

BACKGROUND FACTS

[4] The background facts of this case are mostly undisputed and have been incorporated with or without adjustments from the statement, affidavit in support and the written submissions of the parties.

D

[5] The applicant is the husband holding a 'dependant' pass to a social visit pass issued to his wife, one Nilima Islam, as the 'principal' pass holder under the MM2H program.

E

[6] The approval of the said principal pass to his wife and the dependant pass to the applicant was given vide letter dated 27 November 2008 and 24 December 2008 issued by the Immigration Department.

F

[7] The fact of the applicant being a holder of a dependant pass is clearly borne out in the title of the letter in exh JIM2, encapsulated as 'Application for Defendant of social visit pass Holder under 'Malaysia My Second Home Programme' ('MMSHP').

G

[8] Clause (d) of the said approval set out as one of the terms of the approval that 'the duration of the dependant's social visit pass is subjected to the validity of the principal's approval'.

H

[9] Nilima Islam principal pass and the applicant's dependant pass were subsequently renewed and extended for a further period of ten years vide approval given by the Immigration Department in its letter dated 25 July 2018 (exh JIM3).

I

[10] Clause 2.6 of the said letter provides an additional term that 'in the event that the Ministry of Tourism & Culture Malaysia/Immigration Department of Malaysia/Royal Police of Malaysia found that you have committed a crime in Malaysia or elsewhere, your stay under this programme will be immediately terminated'.

[11] On 8 January 2021 the principal pass of Nilima Islam was cancelled by the first respondent in exercise of the power given to him as the Director General of Immigration under s 9(1)(b) of Act 155.

[12] A notice of cancellation of pass was issued by the first respondent on 8 January 2021 (exh JIM4). Section 9(1)(b) of Act 155 states that the first respondent 'may in his absolute discretion cancel any pass at any time by writing under his hand'. Nilima Islam was blacklisted on 10 January 2021 and was subsequently deported to Bangladesh on 5 March 2021.

[13] The cancellation of Nilima Islam's principal pass and the deportation to her country of origin followed her earlier arrest by the Special Branch of PDRM. Her arrest by the PDRM was based on intelligence of her involvement in a syndicate providing illegal temporary working pass to foreigners to come to Malaysia. The activities of the syndicate had endangered national security.

[14] With the cancellation of Nilima Islam's principal pass and her deportation to Bangladesh, the Special Branch of PDRM recommended to the first respondent to cancel the Dependant's Pass of the applicant and to deport him back to Bangladesh, on ground that PDRM's intelligence revealed that the applicant was likewise involved in the same illegal activities as his wife which had endangered national security.

[15] On 16 December 2021 the applicant's dependant pass was cancelled under s 9(1)(b) of Act 155. A notice of cancellation of pass dated 16 December 2021 was issued by the first respondent (exh JIM5).

[16] Following the cancellation of his dependant pass, the applicant was arrested by Immigration Officers on 26 January 2022. 270 foreign passports were found with the applicant when he was arrested.

[17] On 16 February 2022 the applicant was charged in the Semenyih Sessions Court under s 55E of Act 155 and s 12(1)(f) of the Passports Act 1966 (Act 150) for the said 270 foreign passports found on him.

[18] The applicant was properly represented by counsel. On 11 April 2022 the applicant was released on bail while awaiting trial for the said criminal charges at the sessions court.

[19] The notice of cancellation of pass in exh JIM5 was served on the applicant on 3 February 2022 the receipt of which was duly acknowledged by the applicant.

A THE LAW

[20] Judicial review is generally concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety.

B

[21] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the courts to scrutinise the decision not only for the process, but also for substance.

C

[22] However, the Federal Court in subsequent decisions held that not every case is amenable to such approach and merits can only be scrutinised in the most appropriate of cases. This can be seen as follows:

D (a) *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625; [2003] 2 MLRA 114:

> [12] Quite clearly, the views expressed by the majority in *Rama Chandran* are not the product of what some legal commentators described as 'judicial excessivism'. *On the contrary, they reflect the kind of controlled judicial activism* E *that is needed in order to meet, in a supervisory context, the ever-widening powers conferred upon statutory tribunals or other bodies which have proliferated, in modern times and affecting, quite conceivably, all facets of society. I say 'controlled' because I take the view that Rama Chandran powers should only be invoked in appropriate cases. Otherwise, there is the danger of inculcating what a learned writer has aptly described as a 'runaway development of judicial review'.* (See F Dr Venkat Iyer: The Importance of Judicial Review, Insaf, Vol xxxi No 4, p 60. In drawing attention to the Indian experience, he says this:
>
> > *India stands out as a prime example of this unfortunate development. There, the courts, have assumed competence over an amazing array of public activity: they have given directions as to the width of a road giving access to a building.* G (*Upendra Baxi v State of Uttar Pradesh* [1986] 4 SCC 106); *asked a State to pass legislation to prevent ragging of college students,* (*State of Himachal Pradesh v A Parent of a student of Medical College, Simla* [1985] 3 SCC); *revoked the limit that had been put on the expenditure on drugs in a mental hospital,* (*Rakesh Chand Narain v State of Bihar* [1986] Supp 576); *laid* H *down guidelines for inter-country adoption of children,* (*Laxmi Kant Panday v Union of India* AIR [1987] SC 232); *prescribed the qualifications for drivers of buses belonging to or hired by educational institutions,* (*MC Mehta v Union of India* [1998] IX AD (SC) 37); *sad so on.*
>
> [13] According to him, the Indian practice has been the subject of criticism I because the courts would have encroached upon the sphere allotted to the legislature by making populist declarations of rights — rights which Parliament, in its wisdom, chose not to legislate upon.
>
> [14] *Clearly therefore, not every case is amenable to the Rama Chandran approach. It depends on the factual matrix and/or the legal modalities of the case.*

This is certainly a matter of judicial discretion on the part of the reviewing judge. In the instant case, notwithstanding the very able submission by Dato' Dr Cyrus Das, I remain unconvinced that a case has been made out for revisiting *Rama Chandran* in terms of his propositions. That being the case, the answer to the question postulated for our consideration has to be in the affirmative. (Emphasis added.)

(b) *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 5 MLRA 696; [2010] 8 CLJ 629; [2011] 3 AMR 38:

[16] The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post *Rama Chandran* cases have applied some brakes to the court's liberal approach in *Rama Chandran*. The Federal Court in the case of *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1996] 2 MLRA 398; [1997] 2 CLJ 11; [1997] 1 AMR 1008; [1997] 2 CLJ 11 after affirming the *Rama Chandran* decision held that *there may be cases in which for reason of public policy, national interest, public safety or national security the principle in Rama Chandran may be wholly inappropriate.*

[17] The Federal Court, in *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, again held that *the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the Rama Chandran approach.* Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plan irrationality, even where the reviewing judge might not have come to the same conclusion. (Emphasis added.)

(c) *Alam Venture Sdn Bhd & Anor v Abdul Aziz bin Abdul Majid & Ors* [2015] 4 MLJ 270; [2015] 5 CLJ 1; [2015] 4 MLRA 371:

It is now settled law that the courts may review the decision of an inferior tribunal on the grounds of illegality, irrationality and possibly proportionality: *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147, thus permitting the courts to scrutinise the decision not only for process but also for substance. In *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625 *this court however clarified that not every case was amenable to judicial review pursuant to the principle in R Rama Chandran's case. It should only be invoked in appropriate cases. There may be cases in which for reasons of public policy, national interest, public safety or national security it may be wholly inappropriate for the courts to attempt any substitution of views: Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1996] 2 MLRA 398; [1997] 2 CLJ 11; [1997] 1 AMR 1008; [1997] 2 CLJ 11. (Emphasis added.)

[23] It is settled law that the High Court will not interfere with a decision of the respondents unless it can be established that the decision is infected with errors of law.

[24] The meaning of error of law has also been explained by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 1 MLRA 268; [1995] 2 CLJ 748; [1995] 2 AMR 1601 in the following words:

> *It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law,* for the categories of such an error are not closed. *But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations* (what may be conveniently termed an Anisminic error) or *if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.* (Emphasis added.)

[25] Similarly, in the case of *Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh* [2000] 3 MLJ 714; [2000] 1 MLRA 664; [2000] 4 CLJ 77, the Court of Appeal held that an erroneous inference of facts is also an error of law which would warrant an order of certiorari:

> On the other hand, we accept, of course, that it is entirely competent for the High Court in certiorari proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference. *An erroneous inference from proved or admitted facts is an error of law; not an error of fact.* (Emphasis added.)

[26] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicant must show that the respondents had, among others:

(a) asked itself the wrong questions;

(b) considered irrelevant matters;

(c) failed to consider relevant matters;

(d) failed to apply the proper principle(s) of law; and/or

(e) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

THE DECISION OF THE COURT

[27] The applicant submits that the action and decision of the first respondent in cancelling the applicant's MM2H Pass on 16 December 2021

was done without reasonable excuse and is ultra vires due to the lack of adherence to procedural requirements prescribed by the law. A

[28] According to the applicant, the arbitrary, unreasonable and mala fide cancellation of the applicant's Pass had also resulted in substantial losses for the applicant and his wife who have invested a great deal under the MM2H programme. B

[29] Furthermore, the notice of cancellation of pass was not duly served on time to the applicant, it was served only 49 days on 3 February 2022 after the said notice was issued on the 16 December 2021. Therefore, the applicant was deprived the opportunity to exercise his right to appeal to the Minister under s 9(8) of Act 155. C

[30] It is to be noted that the applicant, who holds a 'Dependant' Pass, is the husband of Nilima Islam, where she is the 'Principal' Pass holder under the MM2H program. D

[31] The approval of the said principal pass to his wife and the dependant pass to the applicant was given vide letter dated 27 November 2008 and 24 December 2008 by the Immigration Department. E

[32] Nevertheless, the principal pass held by the applicant's wife was cancelled by the first respondent under s 9(1)(b) of Act 155 on 8 January 2021, leading her deportation to Bangladesh on 5 March 2021. F

[33] Based on the above, it is clear that the applicant's dependant pass was cancelled by operation of law under s 9(6)(b) of Act 155 read together with s 9(4)(a) of Act 155 following the cancellation of his wife's principal pass under s 9(1)(b) of Act 155. G

[34] Sections 9(4) and 9(6)(b) of Act 155 read as follows:

> 9 *Director General's power to prohibit entry, or cancel any Pass or Permit* H
>
> (4) Where *a Pass is cancelled* under paragraph (1)(b) or a Permit is cancelled under paragraph (1)(c) —
>
> (a) If its holder is present in Malaysia, *he shall not remain in Malaysia after such cancellation and shall be removed from Malaysia* in accordance with the provisions of this Act, *and he shall, thereafter, be prohibited from entering Malaysia;* and I
>
> (b) ...
>
> (6) Where a Pass is cancelled under paragraph (1)(b) or a Permit is cancelled under paragraph (1)(c); *subsections (4) and (5) shall apply to —*

A (a) ...

(b) *any wife of the holder of the Pass or the Permit where the wife is a holder of a Pass or Permit issued to her in consequence of the issue of the Pass or the Permit to her husband;* and

B (c) ...

In the same manner that they apply to the holder of the Pass or the Permit *and the notification to such holder under subsection (3) shall also constitute notification to the persons mentioned in paragraphs (a), (b) and (c).* (Emphasis added.)

C **[35]** Based on the above provisions, this court is of the view that when the principal pass of the applicant's wife was cancelled on 6 August 2021 under s 9(1)(b) of Act 155, s 9(6)(b) of the same Act was automatically triggered wherein the applicant's dependant pass was invalidated under s 9(4) of Act 155 and consequently, the applicant as the dependant pass holder is required to D leave Malaysia and is prohibited from re-entering thereafter as stipulated in s 9(4)(a) of Act 155.

[36] Further, by virtue of s 9(6)(b) of Act 155, once the applicant's wife E principal pass was cancelled under s 9(1)(b) of Act 155 on 8 January 2021, and the applicant's wife was notified of the cancellation of her principal pass on 8 January 2021 (see: exh JIM4), such notification to the applicant's wife on 8 January 2021 shall be considered as notification to the applicant regarding to the automatic cancellation of his dependant pass.

F

[37] This court is of the view that since s 9(6)(b) of Act 155 read together with s 9(4)(a) of the same Act dictate the cancellation of the applicant's dependant pass is mandated by legal provisions, therefore, it is evident that the cancellation of the applicant's dependant pass was carried out in accordance G with the law, leaving no room for doubt.

[38] I am in the opinion that the usage of the word 'shall' in s 9(6)(b) and 9(4)(a) of Act 155 unambiguously indicates that the cancellation of the H applicant's dependant pass and his deportation are mandatory and compelled by legal framework.

[39] Further, this court finds that since the applicant was deemed to have actual knowledge of the automatic cancellation of his dependant pass on I 8 January 2021, the cause of action to file the present judicial review ('JR') would have accrued on 8 January 2021.

[40] In the current case, the applicant, filed the present JR on 25 May 2022 which considerably exceeded the stipulated 90 days timeframe even after

deducting the period for which the applicant was under remand and custody where he was unable seek any legal advice. A

[41] According to the applicant's narration, he was initially arrested on 3 December 2020 and was remanded until 18 January 2021. Subsequently, the applicant attested that he faced a second arrest on 26 January 2022 while still on bail. B

[42] The applicant had sought extension of time which was granted by this honourable court to file this JR however, the period for the said extension was confined to the period starting from his second arrest and the filing of the present JR ie from 26 January 2022–22 May 2022. C

[43] Moreover, there was no JR filed to challenge the automatic cancellation of the applicant's dependant pass between 18 January 2021 and 26 January 2022 when the applicant was out on bail. The applicant is without a doubt guilty of indolence for he had procrastinated to the entire period spanning across 12 months. D

[44] It is my view that since the applicant's dependant pass had been cancelled by operation of law on 8 January 2021 and the applicant was deemed to have actual notice of that operation of law on 8 January 2021, the issuance of the notice of cancellation of pass on 16 December 2021 (exh JIM5) and the personal notification of the same to the applicant on 3 February 2022 would not revive into the dependant pass which has been cancelled by operation of law. E F

[45] Moreover, the action taken by the first respondent in issuing exh JIM5 on 16 December 2021 merely reinforced an independent and supplementary basis for the cancellation of the applicant's dependant pass through operation of law. G

[46] Having reading s 9(6)(b) of Act 155 together with s 9(4)(a) of the same Act and considering cl (d) in the approval letter dated 24 December 2008 (exh JIM2) it is clear that automatic cancellation of the dependant pass was explicitly stipulated as a condition for issuing the said pass. H

[47] Therefore, I find that the applicant's assertions that the first respondent's action were bad in faith, an unreasonable exercise of power, and an abuse of power cannot be substantiated. I

A **[48]** Further, cl 2.6 of the approval for renewal/extension of pass dated 25 July 2018 (exh JIM3) provides an additional term that in the event the applicant being found committed an offence, the applicant's dependant pass will be immediately terminated.

B **[49]** Upon reading of cl 2.6 of the approval for renewal/extension of pass dated 25 July 2018 (exh JIM3), I find that it does not support the contention that the applicant must be convicted in court for a criminal offence before his dependant pass can be cancelled.

C **[50]** I find that cl 2.6 states in no uncertain terms that 'in the event that the Ministry of Tourism & Culture Malaysia/Immigration Department of Malaysia/Royal Police of Malaysia found that you have committed a crime in Malaysia or elsewhere, your stay under this programme will be immediately
D terminated'.

[51] The meaning of the condition is thus clear: so long as the relevant enforcement agency ie PDRM or Immigration Department 'found' that the applicant 'had committed a crime in Malaysia', his dependant pass will be
E 'immediately terminated'. It is apparent that cl 2.6 does not say that the applicant's dependant pass can only be cancelled upon a criminal conviction by the court.

F **[52]** Therefore, based on the above, I am of the view that the cancellation of the applicant's dependant pass does not necessitate or depend solely on a prior conviction of criminal charges in a court of law.

[53] Further, matters concerning immigration particularly the expulsion of
G foreign national to their country of origin falls within the exclusive domain of the executive competence.

[54] It is for this reason than an alien's presence in a foreign country is a privilege and not an inherent right, subject, as always, to the continuity of
H friendly relationship between the host and the visiting countries.

[55] It is not uncommon to find that due to change in individual circumstances, an alien or a class of alien who may not have committed any criminal offence in the strict legal sense in a visiting country may nonetheless
I find themselves a 'persona non grata' whose continued presence are no longer welcomed.

[56] I am of the view that to suggest otherwise that removal of an alien from a visiting country must premised on actual criminal conviction by the court as

contended by the applicant, is not only unsupported by conventional practice but is also an unjustified restraint on the exercise of sovereign privilege by the executive.

[57] In the local context, that conventional practice is translated in s 9 of Act 155 read together with s 33 of the same Act. Section 33(1) reads as follows:

> 33 Removal of persons unlawfully remaining in Malaysia
>
> (1) Where the presence of any person in Malaysia is unlawful by reason of section 9, 15 or 60 the person shall, *whether or not any proceedings are taken against him in respect of any offence against this Act,* be removed from Malaysia by order of the Director General. (Emphasis added.)

[58] Section 33 above establishes that cancellation of the applicant's dependant pass under s 9 alone is sufficient to render his presence in Malaysia unlawful, without the need for prior conviction of any immigration offence in court.

[59] More importantly, the facts in the present case shows that there were such findings on involvement in criminal activities made by the PDRM and the first respondent: intelligence from the Special Branch of PDRM revealed that the applicant was involved in the same illegal immigration activities as his wife which had endangered national security (para 8 encl 20).

[60] Section 59A(1) of Act 155 allows partial judicial review which is confined to procedural compliance by the first or second respondent. Beyond the extent of procedural compliance, 'there shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General'.

[61] Further, s 59A(2) of Act 155 specifically prohibits reliefs in the form of prerogative orders of mandamus, prohibition and certiorari, and application for a declaration or an injunction. The decision, direction and act pertaining to cancellation of Pass is expressly mentioned in s 59B(b) of Act 155 as an 'order' by which the exclusion of JR seeks to cover under s 59A of Act 155.

[62] The decision to cancel a pass by the first or second respondent is meant to be immune from judicial scrutiny, except within the narrow confine of procedural compliance. In other words, merits of the consideration underlying a decision to cancel a pass is a matter reserved to the good judgment of the Immigration authority and/or Minister.

(See: *Haris Fathillah bin Mohamed Ibrahim & Ors v Tan Sri Dato' Sri Hj Azam bin Baki & Ors* [2023] 2 MLJ 296; [2023] 3 MLRA 266; [2023] 3 CLJ 653; and *Regina (Privacy International) v Investigatory Powers Tribunal* [2020] AC

A 491; [2019] UKSC 22.)

[63] This court is of the view that the fact in the present case which entails consideration of national security ie intelligence gathering by Special Branch of PDRM pertaining to illegal activities of immigration syndicates provides a proportionate justification on the limit of judicial intervention as found in s 59A of Act 155.

[64] This court holds the firm view that the executive decision pertaining to national security and immigration is not within the purview of this court to be assessed on the substantive merits of the application. Such an assessment would essentially equate to scrutinizing the judiciousness of policy determinations made by the cabinet.

[65] The then Supreme Court in the case of *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 at p 799; [1996] 2 MLRA 398; [1997] 2 CLJ 11; [1997] 1 AMR 1008 held as follows:

> Of course, there may be cases in which — *for reasons of public policy, national interest, public safety or national security — it may be wholly inappropriate for the courts to attempt any substitution of views.* Unlike the executive, *the judiciary is not armed with all the information relevant to such matters and one could well understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations.* Each case must be considered on its own facts and it would be quite unwise to attempt the formulation of an all-embracing rule. (Emphasis added.)

[66] Reverting to the facts in the present case, s 9(6)(b) of Act 155 read together with s 9(4)(a) of the same Act dictate the mandatory cancellation of the applicant's dependant pass by operation of law, and without the need of any intervention or action on the part of the first respondent, it follows that there can be no question of the cancellation of the applicant's dependant pass not being done in accordance with law.

[67] The applicant also complained that he was deprived the right to appeal to the Minister under s 9(8) of Act 155. However, upon perusal of the cause papers, I find that he was not deprived the right to appeal to the Minister under the said section, this is despite the fact of his inability to comply with the statutory time limit of seven days for filing of appeal (as he was under remand at the material times). For in any event, his lawyer had lodged an appeal on his behalf to the Minister vide letter dated 15 April 2022 (para 36 encl 2).

[68] This is again despite the fact that the said appeal to the Minister was not received by the first respondent as required of and informed to the applicant

vide the notice of cancellation of pass in exh JIM5 (para 16 encl 20). The applicant had deposed that the Minister has yet to make any decision on his appeal to this date (para 37 encl 2).

[69] Further, it is my view that lodging an appeal to the Minister under s 9(8) of Act 155 does not operate as a stay against the cancellation of the applicant's dependant pass by the first respondent and does not have the effect to stop the immediate deportation or removal of the applicant from Malaysia.

[70] I find support for my view by referring to the proviso of s 9(8) of Act 155 which states as follows:

> ...
>
> Provided that *notwithstanding any appeal under this subsection, pending the determination of such appeal,* the order of the Director General under paragraph (1)(a), or *the cancellation of the Pass or Permit under paragraph (1)(b)* or (c) respectively, or the *application of subsections (4) and (5) to any person under subsection (6), shall have full force and effect* as provided under subsection (2) or (3), as the case may be, and where accordingly the *person appealing* is outside Malaysia, or has left Malaysia or been removed from *Malaysia before its determination,* he may be permitted to enter or re-enter Malaysia if his appeal is allowed and the order under paragraph (1)(a) is revoked, or the Pass or Permit is restored to him, as the case may be. (Emphasis added.)

[71] The above proviso to sub-s 9(8) of Act 155 clearly states unequivocally that notwithstanding any appeal to the Minister, the cancellation of the pass and the removal/deportation by the first respondent 'shall have full force and effect' from the date of the cancellation.

[72] Having read to s 9(8) of Act 155, I view that the said section does not impose any procedural obligation on the part of the respondents. The failure on the part of the Minister to decide or respond to the appeal, if any, does not without more amount to a procedural non-compliance actionable by way of a JR.

[73] Even if it does, this court views that s 59A of Act 155 prohibits a merits review, the question of whether the applicant's appeal should be allowed or otherwise is not a matter amenable to JR. Hence, the reliance by the applicant on his pending appeal to the Minister under s 9(8) of Act 155 would not in any event assist his present JR.

A CONCLUSION

[74] Premised on the aforesaid reasons, I am of the view that the decision of the respondents is not tainted with any errors of law, irrationality and/or unreasonableness that warrant the intervention of this court.

B

[75] As such, the applicant's application for JR (encl 14) is dismissed with costs of RM2,500 without the allocator fee.

Enclosure 14 dismissed with costs of RM2,500 without allocator fee.

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Reported by Dzulqarnain Ab Fatar

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